

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-2717

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**TERRY AND CATHY LAUBE, AND
RICHARD AND HARRIET LAUBE,**

PLAINTIFFS-RESPONDENTS,

V.

CITY OF OWEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Clark County: JOHN V. FINN, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. The City of Owen (the City) appeals from an order of the circuit court awarding litigation expenses to the condemnees, Terry and Cathy Laube and Richard and Harriett Laube. The City argues that the trial court erred in deciding that the City failed to negotiate in good faith for the purchase of

the Laubes' property; erred in deciding that the Laubes are entitled to litigation expenses under § 32.28(3)(b), STATS.;¹ and erroneously exercised its discretion in the amount of the fees awarded. We do not reach the first two issues for reasons we explain in the decision. We conclude the trial court did not erroneously exercise its discretion when it awarded the Laubes attorneys' fees. We therefore affirm.

BACKGROUND

The Laubes brought this action under § 32.05(5) STATS.,² challenging the City's right to condemn their property. After several months of

¹ Section 32.28, STATS., provides in part:

(1) In this section, "litigation expenses" means the sum of the costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees necessary to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners, board of assessment or any court under this chapter.

(2) Except as provided in sub. (3), costs shall be allowed under ch. 814 in any action brought under this chapter. If the amount of just compensation found by the court or commissioners of condemnation exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer, the condemnee shall be deemed the successful party under s. 814.02 (2).

(3) In lieu of costs under ch. 814, litigation expenses shall be awarded to the condemnee if:

....

(b) The court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking.

² Section 32.05(5), STATS., provides:

(5) COURT ACTION TO CONTEST RIGHT OF CONDEMNATION. If an owner desires to contest the right of the condemnor to condemn the property described in the

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negotiations and an eventual trial, the trial court issued a decision in the Laubes' favor. In a September 6, 1995 order, the trial court concluded that the City had not negotiated in good faith for the purchase of the Laubes' property, and therefore the City did not have the right to condemn their property. The trial court also found that the Laubes were entitled to litigation expenses under § 32.28(3)(b), STATS., and stated that if the parties could not agree on the amount of the litigation fees, the trial court would hold a hearing.

Since the parties were unable to agree on the amount of attorney fees, the trial court held an evidentiary hearing on this issue. After the hearing, the trial court entered an order on June 28, 1996, awarding the Laubes \$17,010 in attorneys' fees pursuant to § 32.28(3)(b), STATS. The City appealed from the September 1995 order and the June 1996 order. The Laubes filed a motion to dismiss the appeal of the September 1995 order on the ground of untimeliness. We granted the motion, holding that even though the litigation expense issue was still pending, the September 1995 order was a final order and should have been appealed earlier. *See Laube v. City of Owen*, 209 Wis.2d 12, 561 N.W.2d 785 (Ct. App. 1997). Since the appeal of the issues whether the City failed to negotiate in good faith and whether the plaintiffs were entitled to litigation expenses was thereby dismissed, the only issue before this court is the amount of attorney fees. *See* RULE 809.10(4), STATS.

jurisdictional offer, for any reason other than that the amount of compensation offered is inadequate, the owner may within 40 days from the date of personal service of the jurisdictional offer or within 40 days from the date of postmark of the certified mail letter transmitting such offer, or within 40 days after date of publication of the jurisdictional offer as to persons for whom such publication was necessary and was made, commence an action in the circuit court of the county wherein the property is located, naming the condemnor as defendant.

ATTORNEY FEES

The City first challenges the trial court's determination of the reasonable number of hours, asserting that the Laubes doubled the attorney hours invested in the case by hiring two attorneys. The City also contends that the attorney fees are inflated. We disagree on both points.

We sustain a trial court's determination of what attorney fees are reasonable under § 32.28(3)(b), STATS., unless there is an erroneous exercise of discretion. *Village of Shorewood v. Steinberg*, 166 Wis.2d 794, 806, 480 N.W.2d 780, 784 (Ct. App. 1992). A trial court properly exercises its discretion if it uses a logical rationale based on the necessary legal principles and facts of record. *Petros v. City of Watertown*, 152 Wis.2d 692, 694, 449 N.W.2d 72, 73 (Ct. App. 1989).

The trial court held an evidentiary hearing and based its decision on the prehearing submissions, the hearing testimony and the post-hearing argument. After the Laubes' attorney presented testimony on the total number of hours that he and another attorney spent on the case, the court accepted the hours. The court stated that it "was satisfied with the number of hours that were put in by the two attorneys." The court also stated that it was "satisfied that based on the testimony that I heard here today, that a team approach is consistent with common practice today. I don't think there's duplication."

With respect to the hourly rate, the trial court heard testimony on hourly fees from two attorneys who practice condemnation law. Thomas Terwilliger, an attorney who practices in the Portage County area, testified that the going rate for attorney fees in similar cases is "anywhere from \$90 to \$135 an hour," and Michael Wherry, who practices in Milwaukee testified that his firm

charges \$200 an hour for a partner and \$170 an hour for an associate. Although the trial court acknowledged that the Laubes' attorney did a wonderful job, the trial court chose to accept Terwilliger's hourly rate and rejected the Laubes' attorney's rate of \$200 and \$170. After hearing the testimony, the trial court stated that:

What I'm going to do, in the exercise of the Court's discretion, which I determine to be – I'm going to determine that the, the rate – the reasonable rate in this area should be \$135 an hour, and I'm going to allow all of the hours that Mr. Marcuvitz and his associate have put in, and I think that results somewhere in the neighborhood of \$17,000. In fact, I think it's 17,100. – 17,010.

The court also noted that it considered the factors set forth in SCR 20:1.5³ which addresses the factors to be considered in determining the

³ SCR 20:1.5 provides in part:

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

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reasonableness of attorney fees under the Rules of Professional Conduct for Attorneys. We conclude that the trial court properly exercised its discretion in determining the number of hours and the hourly rate.

The City next contends that the trial court erred in its fee award because the Laubes succeeded in only one of six challenges to the condemnation action. This presents an issue of statutory construction, which we review de novo. *State v. Fouse*, 120 Wis.2d 471, 476, 355 N.W.2d 366, 369 (Ct. App. 1984). The plain language of § 32.28(3)(b), STATS., requires an award for attorney fees to the plaintiff if “the court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking.” That is exactly what the court determined here. Besides that requirement, the statute provides only that attorney fees must be “reasonable” and “necessary to prepare for or participate in actual or anticipated proceeds before the condemnation commission, board of assessment, or any court....” Section 32.32(1), STATS. There is no language in the statute implying that “reasonable” refers to the ratio of the issues successfully challenged to those raised. We conclude the trial court was correct in not reducing the award of fees for this reason.

Finally, the City argues that the trial court improperly awarded the Laubes attorneys’ fees because the condemnation action was not abated by the court’s decision. It appears that the City is rephrasing its argument concerning the trial court’s finding of lack of good faith negotiation, an issue, as we have already said, we do not have jurisdiction to address. Under the plain language of § 32.28(3)(b), STATS., the court must award the Laubes attorneys’ fees if the court

(8) whether the fee is fixed or contingent.

determines that the City does not have the right to condemn part or all of the Laubes' farm or there is no necessity for its taking. The trial court's finding of lack of good faith negotiations means that the City did not have the right to condemn the Laubes' property. *See City of Racine v. Bassinger*, 163 Wis.2d 1029, 1036 n.5, 473 N.W.2d 526, 529 (Ct. App. 1991). Thus, an award of attorney fees as defined in § 32.28(1), STATS., is mandatory.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)(5), STATS.

